



Santa Clara Law Review

Volume 28 | Number 4

Article 2

1-1-1988

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Recommended Citation

Gail Hillebrand and Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 SANTA CLARA L. REV. 747 (1988).

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ARTICLES

CLAIMS PROCEDURES IN LARGE CONSUMER CLASS ACTIONS AND EQUITABLE DISTRIBUTION OF BENEFITS

Gail Hillebrand* and Daniel Torrence**

I. INTRODUCTION

Consumer class actions serve three goals: equity for the class members, disgorgement of ill-gotten gains, and deterrence of future wrongdoing.¹ Equity includes both the adequacy of the amount compensated to the class and the fairness of the manner in which that compensation is distributed among the class.² Settlements and judgments in class action cases have often required class members to submit claims in order to share in the proceeds of the recovery. Recent cases suggest that claims procedures are ill-suited to consumer class actions in which the class size is very large and the amount of damages per class member is relatively small. These cases are characterized by very low claims rates.³ A low claims rate may cause an ineq-

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** Law Student, University of California, Hastings, J.D. expected in 1989; B.S., 1980, University of Utah. This author assisted in the writing of this article while he was a legal intern in the West Coast Regional Office of the Consumers Union of U.S., Inc. He would like to make the following dedication: To my parents, Frank A. Torrence and Billie G. Torrence, who are in a class by themselves.

1. Note, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591, 1594, 1596 (1987). See also 1 H. NEWBERG ON CLASS ACTIONS § 1.05, at 7 (1977) (one purpose of class actions is to provide "effective redress" to persons for whom "it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages") (quoting *Deposit Guar. Nat'l Bank Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 329 (1980)).

2. Note, *Equitable Trusts*, *supra* note 1, at 1596.

3. See *infra* notes 25-44 and accompanying text.

uitable distribution of benefits among the class members. Those who submit a claim receive benefits, while those who do not may receive nothing.⁴ There is also evidence that claims requirements are skewed in favor of the more educated and more affluent.⁵ A low claims rate also frustrates the goals of deterrence and disgorgement. As the California Supreme Court has stated, "[d]efendants may be permitted to retain ill-gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts."⁶ The very low claims rates reported in several recent cases involving large classes suggest that claims procedures are inherently unlikely to be equitable to large consumer classes unless they are accompanied by other distribution mechanisms to benefit nonclaiming class members.

This article will examine claims procedures as they have been used in consumer class actions. It will explore the mechanisms courts and counsel can use to augment claims procedures and thereby ensure that a claims requirement does not result in inadequate or inequitable distributions.⁷ It concludes that the goals of deterrence of wrongdoing and equity for disadvantaged class members demand the creative use of "next best use" remedies such as the consumer trust fund in conjunction with claims procedures.

II. CLAIMS PROCEDURES IN CLASS ACTION CASES

The benefits of a class action settlement or judgment can be distributed in a number of ways.⁸ Most common is the settlement or judgment which requires class members to make claims in order to receive benefits. In his treatise on class actions, Professor Newberg characterizes claims procedures as a type of "formula settlement," in which the settlement states a formula by which the amount due each claimant will be computed. This "ordinarily requires each class member to file a statement of claim or of purchases in order to recover."⁹ Claims procedures can vary from a simple request for benefits to requirements for sworn statements of entitlement detailing information documenting class membership and damages.¹⁰ The more

4. See *infra* notes 45-66 and accompanying text.

5. See *infra* notes 67-93 and accompanying text.

6. *State v. Levi Strauss & Co.*, 41 Cal. 3d 460, 472, 715 P.2d 564, 571, 224 Cal. Rptr. 605, 612 (1986).

7. See *infra* notes 94-152 and accompanying text.

8. 1 H. NEWBERG, *supra* note 1, § 12.35, at 570.

9. 1 H. NEWBERG, *supra* note 1, § 12.35, at 570.

10. See, e.g., *Quirke v. Chessie Corp.*, 368 F. Supp. 558, 560 (S.D.N.Y. 1974) (settle-

complex the claims requirements, the fewer class members may be expected to make claims.¹¹

A. *Claims Requirements Where the Per Capita Stake is Large*

Claims requirements are most likely to be effective in delivering benefits to a class when the size of the typical claim or other characteristics of the case make it likely that a high proportion of class members will actually file a claim. Commercial class members, for example, are likely to be sophisticated business entities who have enough at stake so that they can reasonably be expected to learn about and comply with a claims process. For example, *In re Corrugated Container Antitrust Litigation*¹² dealt with multidistrict price fixing by numerous container manufacturers. In *Corrugated*, the value of the claim in litigation was between \$1,000 and \$4,000 per class member.¹³ In *In re Folding Carton Antitrust Litigation*,¹⁴ another class action, 2,632 class member businesses actually filed claims based upon 77% of all the affected purchases during the limitations period. Those claims were expected to exhaust 97% of the principal of the settlement fund. The average recovery in that case of about \$79,000 may explain the high claims rate.¹⁵ In a securities case where the average claim filed was \$2,848, 43% of the class filed claims.¹⁶

Claims procedures have also been used in class toxic tort and personal injury actions. Recently, United States District Court Judge Robert Merhige, Jr., ordered the A.H. Robins Company to establish a \$2.48 billion trust fund to provide funding for the esti-

ment reopened stock exchange offer, class members given additional time to accept the offer and exchange stock); *Levi Strauss*, 41 Cal. 3d at 469, 715 P.2d at 568, 224 Cal. Rptr. at 609 (claims form mailed to 8.6 million households; consumers required to return claim form without proof of purchase except that claimants submitting the largest one percent of the claims were required to submit a notarized confirmation); *In re Dairy Products Litigation*, 1979-1 Trade Cas. (CCH) ¶ 62,605 (D. Ariz. Oct. 26, 1978) (claims form required of each household to state length of time household had been present in the state and the average number of household members during period in question).

11. 1 H. NEWBERG, *supra* note 1, § 8.40, at 178-79.

12. 659 F.2d 1332 (5th Cir. 1981), *cert. den.*, 456 U.S. 936 (1982).

13. *Id.* at 1334, 1337.

14. 557 F. Supp. 1091 (N.D. Ill. 1983), *aff'd. in part, rev'd. in part*, 744 F.2d 1252 (7th Cir. 1984), *cert. den.*, 471 U.S. 1113 (1985).

15. *Id.* at 1098. The 2,632 claimants were paid a total of \$208,000,000, making each class member's recovery approximately \$79,000. *Id.*

16. *Seiffer v. Topsy's Int'l, Inc.*, 70 F.R.D. 622, 630 n.9 (D. Kan. 1976); 1 H. NEWBERG, *supra* note 1, Appendix 8-4, at 211.

mated 200,000 Dalkon Shield intrauterine device claimants.¹⁷ If divided evenly, this amount would provide \$12,400 per claimant.¹⁸

In both personal injury class cases and business class cases, the per class member claim may be large enough that class members who receive adequate notice can reasonably be expected to go to the time and trouble to prepare and submit claims. However, this is not true of consumer class cases.

B. *Claims Requirements in Consumer Class Actions*

Claims procedures are far less likely to be effective means for broad and fair distribution of benefits in consumer class actions than in other types of cases. A hallmark of the consumer class action is large class size and relatively small damages per class member. For example, in *State v. Levi Strauss & Co.*, the class consisted of nearly seven million households with a maximum recovery of \$2.00 per pair of Levi pants purchased.¹⁹ Recent class action cases against Wells Fargo Bank, Bank of America, and U.S. Sprint present similarly large classes. In *Stern v. U.S. Sprint*, the class size was estimated at 739,108.²⁰ In *Rebney v. Wells Fargo*,²¹ the class included more than 1,500,000 current checking account customers and a large, undetermined number of former customers over a period of more than ten years.²² In *Rudolfi v. Bank of America*,²³ the class included all persons who had commercial or consumer checking accounts between 1973 and 1988, and was estimated at 8,890,000 persons.²⁴

Where the plaintiff class numbers in the thousands or millions, each with a relatively small claim, equitable distribution of benefits

17. Marcotte, *\$2.48 Billion Trust Fund*, A.B.A. J., Mar. 1, 1988, at 24, col. 1. See also *For Many Dalkon Shield Claimants Settlement Won't End The Trauma*, Wall St. J., Mar. 9, 1988, at 27, col. 4.

18. The authors do not contend that this amount is adequate for the injuries suffered, but merely contrast the \$12,400 per class member stake in this tort class action fund with the typical large consumer class action where the per class member share may be less than \$100.

19. 41 Cal. 3d at 476-77, 715 P.2d at 573-74, 224 Cal. Rptr. at 614-15.

20. Stipulation and Plan of Settlement at 6, *Stern v. U.S. Sprint*, No. CA000933 (L.A. Super. Ct. filed Feb. 12, 1988).

21. No. 720307 (S.F. Super. Ct. filed Apr. 4, 1988).

22. C. Daniel Vencill, *Economic Analysis and Estimates of Net Economic Benefits Under Agreement for Settlement of Certain Class Actions Against Wells Fargo Bank and Crocker Bank, N.A. and Crocker National Bank 1* (Dec. 30, 1988) [hereinafter *Vencill Report*] (on file in the Santa Clara Law Review office).

23. Report and Resume of Sherman J. Maisel, Ph.D., *Rudolfi v. Bank of America*, N.T. and S.A., No. 720308 (S.F. Super. Ct. filed Dec. 16, 1987).

24. *Id.* at 5.

presents a special challenge. The evidence on claims rates in such cases suggests that claims procedures standing alone are extremely unlikely to accomplish the goal of distributing benefits fairly among the entire class.

III. EFFICACY OF CLAIMS PROCEDURES IN ACHIEVING EQUITABLE DISTRIBUTION OF BENEFITS TO CONSUMER CLASS MEMBERS

The data on claims rates in consumer class action settlements raises serious questions about whether a claims-made procedure standing alone can be fair to a class consisting of a large number of consumers with relatively small individual claims.

In *State v. Levi Strauss & Co.*,²⁵ only 14% to 33% of eligible class members applied for refunds of clothing price overcharges.²⁶ In *Mazur v. Behrens*,²⁷ a low claims rate in a real estate antitrust action meant that the defendant paid only \$210,000 of a \$1,750,000 maximum agreed to in a partial settlement.²⁸ Only 712 claims were filed in *Mazur* out of an estimated class of 6,800, resulting in a claims rate of 10.5%.²⁹ In a recent settlement of a state-wide California case against Wells Fargo Bank, the claims rate for refunds was significantly less than 5%.³⁰

The *Wells Fargo* settlement included agreements concerning future bank policies, short-term price freezes and rollbacks, and a limited fund for consumer education on banking issues.³¹ The settlement provided that current customers would be eligible for a credit if they agreed to take overdraft protection linked to a savings account or credit card. Former customers became eligible for a partial refund of charges for bounced check fees upon submission and approval of a

25. 41 Cal. 3d at 460, 715 P.2d at 564, 224 Cal. Rptr. at 605.

26. *Id.* at 476, 715 P.2d at 573-74, 224 Cal. Rptr. at 614.

27. 1974-2 Trade Cas. (CCH) ¶ 75,213 (N.D.Ill. Aug. 2, 1974).

28. *Id.*

29. 1 H. NEWBERG, *supra* note 1, § 8.44, at 185.

30. Report of Wells Fargo Bank, N.A. Re: Settlement Implementation, No. 720307, 2-3 (S.F. Super. Ct. dated October 13, 1988) [hereinafter *Wells Fargo Settlement Implementation*] (on file in the Santa Clara Law Review office). See also *infra* text accompanying notes 33-42. The settlement was the subject of much public attention. See, e.g., *Ads Denounce Legal Settlement of Check-Fee Case*, Am. Banker, Jan. 13, 1987, at 2. The authors do not opine here as to whether that settlement as a whole was fair to the class, but rather rely upon the actual post-settlement data concerning the claims rate in that case and others to conclude that a claims procedure should not be used alone in future consumer class cases.

31. Agreement for Settlement of Certain Class Actions Against Wells Fargo Bank, N.A. and Crocker National Bank, No. 720307 (S.F. Super. Ct. filed Apr. 13, 1987).

claim.³²

Plaintiff's expert estimated at the fairness hearing that the partial refund of charges was worth between \$6,814,399 and \$13,628,799, predicting that between 40% and 80% of eligible customers would apply.³³ The expert's report does not state the number of people that would constitute this 40-80% of eligible class members. Based upon data in the follow-up reports, the average amount paid on claims was \$108.31.³⁴ It would take between 62,916 and 125,831 claimants claiming \$108.31 each to reach the range of refunds estimated to the court in support of the settlement. In fact, only 8,901 claims were submitted, and only 4,444 paid in whole or in part,³⁵ for a total of \$481,316.69.

The \$481,316.69 paid out would be far less than the \$6.8 to \$13.6 million estimated at the time the court approved the class settlement. Instead of reaching 40% to 80% of the eligible class members, this refund benefit apparently was claimed and received by less than 3% of those eligible.

The claims rate for the credit portion of the settlement linked to credit cards was also quite low. The class counsels' expert estimated that there were 1,367,878 persons eligible for the credit.³⁶ Of these, he estimated that 95% of all eligible customers already holding a credit card³⁷ and 48% of all other eligible customers would seek the \$18 credit.³⁸ The credit was therefore valued at between \$12,633,764 and \$14,458,272.³⁹ In fact, the total amount of credits linked to credit cards extended by the bank was only \$818,681.⁴⁰ The benefit was received by only 41,747 of the nearly 1.4 million eligible customers.⁴¹ Thus, the claims rate on this aspect of the settlement was about 3.03% of eligible class members. That claims rate would have been even less if the bank had not voluntarily extended the eligibility period for this benefit by several months. Fully one quarter of those who received the benefit did so after the expiration of the period

32. *Id.*

33. *Vencill Report*, *supra* note 22, at 6, 12.

34. *See Wells Fargo Settlement Implementation*, *supra* note 30, at 3-4. The total amount paid on claims (\$481,316.69) divided by the total number of claims paid (2,393 paid in full; 560 overpaid; 1,491 paid in part; 4,444 total) equals \$108.31.

35. *Wells Fargo Settlement Implementation*, *supra* note 30, at 3-4.

36. *Vencill Report*, *supra* note 22, at 2.

37. *Vencill Report*, *supra* note 22, at 1.

38. *Vencill Report*, *supra* note 22, at 3.

39. *Vencill Report*, *supra* note 22, at 1-3.

40. *Wells Fargo Settlement Implementation*, *supra* note 30, at 2.

41. Declaration of Ann Connolly, Re: *Wells Fargo Bank Settlement Implementation*.

called for in the settlement agreement.

Other cases involving large classes have also shown low claims rates. In *Wilson v. Bank of America*,⁴² the bank was held responsible at trial for commingling monies from 176,000 borrowers' impound accounts and failing to pay interest on those funds.⁴³ The judgment in *Wilson* awarded compensatory damages in the amount of \$47 million and punitive damages in the amount of \$54 million.⁴⁴ While the case was on appeal, the parties reached a settlement calling for payment to those persons making claims.⁴⁵ The class consisted of 170,000 loan customers, but only 31,915 filed refund claims.⁴⁶ Only 19% of the *Wilson* class filed claims, some of which were disallowed. Only 18% of the class received benefits from the settlement.⁴⁷

IV. FAIRNESS AND ADEQUACY OF SETTLEMENTS WITH LOW CLAIMS RATES

Low claims rates raise serious questions of both fairness to class members and adequacy of claims procedures to effectuate disgorgement of ill-gotten profits. In *Wilson*, 18% of the class received payment on claims, whereas the remaining 82% received no damage recovery. In *Wells Fargo*, less than 3% of those eligible for refunds received an average of \$108.07 each, while the other 97% of eligible class members did not recover refunds. Similarly, in *Wells Fargo*, 3% of those eligible for an \$18 credit linked to a credit card received one, while the other 97% received no credit. In *Mazur*, the 10.5% of claiming class members received damages, while the other 89.5% did not. A settlement or judgment which causes a defendant to repay less than 20% of wrongful profits is unlikely to serve effectively the goal of disgorgement. Similarly, a settlement which delivers monetary benefit to less than 20% of the class appears extremely unlikely to be fair and equitable to all class members.

Fairness to the entire class is a fundamental rule of class action adjudication.⁴⁸ Thus, a class settlement should not be approved un-

42. No. A020422 (S.F. Super. Ct. filed May 9, 1984).

43. *Id.* at 1.

44. *Id.* at 2.

45. *Id.* at 2-3.

46. *Id.* at 1. 31,915 claims were filed and 29,802 of these were allowed for a total of \$5,091,171.19. *Wilson v. Bank of America*, No. A020422, Accounting of Class Claims (S.F. Super. Ct. filed May 9, 1984) [hereinafter *Wilson Accounting*].

47. Of the total 31,915 claims filed, 2,113 were rejected. The remaining 29,802 constitute eighteen percent of the 170,000 person class. See *Wilson Accounting*, *supra* note 46, at 1.

48. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983); *Piambino v.*

less it is "fair, adequate and reasonable."⁴⁹ Trial judges must "review any proposed settlement of a class action to protect non-party members of the class from unjust or unfair settlements affecting their rights."⁵⁰

Most opinions on the fairness of class action settlements do not directly address the issue of whether an anticipated low claims rate will render a settlement unfair. The theoretical basis for the court's fairness determination, however, suggests a duty to consider this issue. The fairness inquiry which precedes approval of a class action settlement is grounded in the fundamental rule that it is the court's "duty to ensure that the interests of the class are reflected fairly and adequately in the decree."⁵¹

A. *Judicial Attitudes Regarding Low Claims Rates*

In two cases, *Norman v. McKee*⁵² and *Jamison v. Butcher & Sherrerd*,⁵³ proposed settlements were deemed unfair because each attempted to compromise some of plaintiffs' claims without compensation for those claims.⁵⁴ The *Norman* court held that a proposed class settlement may be disapproved if it does not "give due regard to the interests of those unnamed."⁵⁵ On appeal, the Court of Appeals upheld the disapproval, stating that "[t]he question for the district judge is whether the proposed settlement is fair and adequate to all concerned."⁵⁶ In *Jamison*, the court held that class members are not adequately compensated by a proposed settlement in which "they are releasing their claims without consideration."⁵⁷ In a class action settlement where there is reason to expect a low claims rate, class mem-

Bailey, 610 F.2d 1306, 1329 (5th Cir. 1980); *Plummer v. Chemical Bank*, 97 F.R.D. 486, 488 (S.D.N.Y. 1983); *Leibman v. J. W. Peterson Coal & Oil Co.*, 73 F.R.D. 531, 534-35 (N.D. Ill. 1973).

49. 3B J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 23.80[4], at 23-488 (2d ed. 1987) ("courts must find class settlements to be fair, adequate and reasonable"); 7B C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE & PROCEDURE* § 1797, at 358 (2d ed. 1986) (courts must find class settlements "fair and reasonable").

50. *Piambino*, 610 F.2d at 1327. See also *Georgevich v. Strauss*, 96 F.R.D. 192, 196 (M.D. Pa. 1982) (court must vigorously act as guardian of the rights of absent class members).

51. *Jamison v. Butcher*, 68 F.R.D. 479, 482 (E.D. Pa. 1975).

52. 290 F. Supp. 29 (N.D. Cal. 1968), *aff'd*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971).

53. 68 F.R.D. 479 (E.D. Pa. 1975).

54. *Norman v. McKee*, 290 F. Supp. 29, 33 (N.D. Cal. 1968), *aff'd*, 431 F.2d 769, 770 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971); *Jamison*, 68 F.R.D. at 482.

55. *Norman*, 290 F. Supp. at 33.

56. *Id.*

57. *Jamison*, 68 F.R.D. at 482.

bers who are unlikely to file claims will lose their cause of action without compensation, just as the class members in the disapproved *Jamison* settlement were asked to sacrifice their claims without consideration.

One case has explicitly considered an expected low claims rate in disallowing a proposed class action settlement. In *Liebman v. J.W. Peterson Coal & Oil Co.*,⁵⁸ a projected claims rate of between 20 and 40% was held too small. The court reasoned that such a low claims rate "would mean that the defendant would retain a substantial portion of any illegal gains rather than be penalized" for its conduct.⁵⁹ Even if low claims rates had been tolerated by courts in the past, the court did "not believe that the fairness of any settlement proposal should be determined on the assumption that the retention by defendants of some of their illegal profits is the norm. . . ."⁶⁰

None of the reported cases in which claims rates have been low contain judicial approval of low claims rates as fair. Newberg's Class Action Manual shows claims rates for thirty-two cases.⁶¹ Newberg's table contains a column entitled "Claims Filed as a Percentage of Total Class Members" which reveals many pathetically low claims rates. However, these rates are not indicative of judicial approbation of low claims rates. There are several reasons for this.

First, judicial approval of the claims rates cannot be inferred because the shortcomings of claims plans are often not apparent for months after the approval of a settlement. Second, the majority of the cases Newberg cites appear in the portion of his table tabulating cases which allowed for pro rata distribution of the fund among the successful claimants.⁶² Leaving aside the equity of dividing a fund only among those who file a claim, such schemes can at least serve the goal of disgorgement of the defendant's ill-gotten gains and of deterrence.

Third, Newberg's table of claims rates does not show what percentage of the total settlement or judgment was exhausted by the reported claims. For example, in one case cited by Newberg involving a low claims rate, *In re Coordinated Pretrial Proceedings in Antibiotics Antitrust Actions*,⁶³ the low claims rate did not substantially reduce the total recovery because those claims that were filed

58. 73 F.R.D. 531 (N.D. Ill. 1973).

59. *Id.* at 536.

60. *Id.*

61. 1 H. NEWBERG, *supra* note 1, Appendix 8-4, at 206-15.

62. 1 H. NEWBERG, *supra* note 1, Appendix 8-4, at 206-15.

63. 410 F. Supp. 669 (D. Minn. 1974).

nearly exhausted the settlement fund. The *Antibiotics* settlement allocated \$29.7 million for consumer claims.⁶⁴ Although only 981,000 claims were filed from a class of twelve million, the claims sought more than four times the amount of the settlement fund.⁶⁵ This is fundamentally different from a typical large consumer class action where an 8% claims rate would allow the defendant to keep 92% of its illegal profit. For example, suppose a large appliance retailer is found guilty of overcharging each of its one million retail customers \$1 per item. An 8% claims rate would result in disgorgement of \$80,000 and retention by the defendant of the other \$920,000 in illegal profits, thus defeating the dual goals of disgorgement and deterrence.

Fourth and most important, many of the cases Newberg reports as having low claims rates did not depend entirely on the claims procedure for the disbursement of benefits. Additional distribution mechanisms used in these cases include price rollbacks,⁶⁶ a default option to receive a discount on future services,⁶⁷ and a default option to contribute one's recovery to a fund for beneficial public projects.⁶⁸

*West Virginia v. Chas. Pfizer & Co.*⁶⁹ demonstrates the ways in which alternative remedies may be creatively used in conjunction with a claims-based procedure. In that case, consumers could choose not to file a claim and thereby automatically authorize the attorneys general of their respective states to use their share of the funds for public health projects. Thus, cy pres relief served the interests of the injured class members despite the practical impossibility of complete distribution of the fund in individual claims.

Low claims rates in class action cases do not indicate that the courts consider low claims rates fair, only that the issue has rarely been squarely presented in the reported decisions. In addition, alternative remedies which can be used in conjunction with claims procedures to make settlements more fair to nonclaiming class members, such as cy pres fluid recoveries, are a relatively recent development.⁷⁰

64. *Id.* at 675.

65. 1 H. NEWBERG, *supra* note 1, Appendix 8-4, at 206.

66. *Colson v. Hilton Hotels Corp.*, 59 F.R.D. 324 (N.D. Ill. 1972).

67. *Butowsky v. Prince George's County Bd. of Realtors*, C.A. No. 71-1086K (D. Mass. filed 1975).

68. *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

69. *Id.* at 734.

70. *See infra* notes 99-112.

B. *Effect of Claims Requirements on Socioeconomically Disadvantaged Class Members*

Socioeconomic bias may render a claims-based distribution procedure unfair to some subgroups within a large consumer class. The evidence shows a strong tendency of claims procedures to skew the benefits of a settlement or judgment in favor of the well-educated, affluent class members and to shortchange the less fortunate.⁷¹

It can be argued that class members benefit by their eligibility to make a claim even if they never actually do so. The responsibility of class counsel and the court to ensure fairness, however, must extend to ensuring fair distribution of actual benefits and not merely to equal eligibility. There are very real inequalities in our society which mean that "equal eligibility" is not the equivalent of true equality of access to benefits.

Two class members may be equally eligible to file a complex claim, but they do not have equal access to benefits if one lacks the ability to understand and complete the claim process. The class member who lacks adequate facility in the English language to understand and file a claim form does not have equal access to the benefits of a claims procedure, despite equal theoretical eligibility. The class member whose education or experience makes him or her either unfamiliar with or wary of official-looking forms also does not have the same access to benefits as the one whose education and cultural background make the filing of a claim form a more familiar and comfortable procedure.

This thesis was documented in a detailed academic study⁷² analyzing the demographics of claimants in the 1975 settlement of the decade-old *In re Antibiotics Antitrust Action*.⁷³ The authors of the extensive study of claimants to a nationwide fund conducted nearly 1,000 detailed interviews with former claimants and nonparticipating class members. The demographic data thus gleaned was compared with similar data on national and state populations.⁷⁴ One of the

71. T. BARTSH, F. BODDY, B. KING & P. THOMPSON, *A CLASS-ACTION SUIT THAT WORKED* 60-64 (1978). This study was suggested and made possible by the presiding judge, Miles W. Lord. Judge Lord recognized that the tremendous capital outlay involved in giving individual notice justified a statistical study to test the efficacy of the notice procedure. The results of the study would then be made available to assist other courts in similar proceedings. The study was funded with money from the administrative fund created by the settlement. See *infra* notes 72-98 and accompanying text.

72. T. BARTSH, *supra* note 71, at xii.

73. 410 F. Supp. 706 (D. Minn. 1975).

74. T. BARTSH, *supra* note 71, at xii.

purposes of the research was "to study the claimants in the class action proceeding and attempt to identify any personal characteristics that set this group off from the general population."⁷⁵

Among the principal results of the study was the finding that claimants tended to be "better educated and correspondingly have higher incomes" than the general class population.⁷⁶ The study found that the number of claimants reporting a family income of \$25,000 or greater was more than twice the corresponding figure for the general population.⁷⁷ The educational level of the claimants was reported as 49.3% having some college background, compared to only 30.4% of persons in the general California population.⁷⁸ Racial demographics were studied with respect to three groups: black, white and other. The participation by blacks as refund claimants in the five states studied was only two-thirds of the level expected based upon black population numbers for those states.⁷⁹

Occupational groups associated with higher incomes were significantly overrepresented in the group of people who filed claims. Fully 49.4% of men and 32.5% of women surveyed in the claimant pool reported their occupation as professional, managerial, or administrative. In the general population, only 33.2% of men and 24.1% of women reported membership in these groups.⁸⁰ By contrast, only 24.3% of men and 7.2% of women claimants surveyed described their occupations as skilled or manual labor, compared to 42.5% of men and 14.2% of women in the general population of California.⁸¹ The authors of the study characterized the differences in education and income level between the claimants and the general population as "striking."⁸² They concluded that "participants in future class actions will be drawn from the responsible, informed, and unalienated mainstream of society."⁸³

A recent attempt to reach and educate telephone consumers about rights, ordered by the California Public Utilities Commission, dramatically highlights the difficulties in effectively educating a broad segment of the population about consumer rights even with an extensive information campaign. In this administrative proceeding,

75. T. BARTSH, *supra* note 71, at 57.

76. T. BARTSH, *supra* note 71, at xv, 57.

77. T. BARTSH, *supra* note 71, at 61.

78. T. BARTSH, *supra* note 71.

79. T. BARTSH, *supra* note 71, at 61, 64.

80. T. BARTSH, *supra* note 71, at 65, Table 3-9.

81. T. BARTSH, *supra* note 71.

82. T. BARTSH, *supra* note 71, at 57.

83. T. BARTSH, *supra* note 71, at xvi.

commonly known as the *Pacific Bell Marketing Issues* proceeding,⁸⁴ a coalition of low income and minority groups intervened in rate proceedings and objected to proposed rate filings on the ground that Pacific Bell had used allegedly abusive marketing practices to promote auxiliary telephone services such as call forwarding, speed dialing, and three-way calling. Intervenors alleged that Pacific Bell had sold these services to persons who had no need of them and to persons who did not know that they had bought auxiliary services.⁸⁵ Intervenors also argued that Pacific Bell had failed to adequately inform eligible persons about the availability of low cost "lifeline" telephone service.⁸⁶

The investigation by the California Public Utilities Commission found "violations of statutes, general orders, and tariff provisions."⁸⁷ The PUC ordered a broad program of customer notification to ensure: (1) that customers who were eligible for lifeline service would learn of that service, and (2) that all customers who had auxiliary telephone services would learn that they had the services in order to make an informed decision whether to keep the services or to seek a refund.⁸⁸

The *Pacific Bell Marketing Issues* proceeding was not a classic claims procedure because customers who received information about the right to a refund could either claim or decide to keep the services and forego the refund. Nonetheless, the refund program was similar to a claims procedure in that its success depended upon educating those with a right to a refund about that right and motivating them to make a decision as to whether to exercise that right.

Pursuant to the order of the PUC to engage in an extensive notification campaign, Pacific Bell mailed announcements to 100% of its individual residential customers, ran advertisements in daily, weekly and monthly publications targeted to senior citizens, Chinese, Koreans, Vietnamese, Blacks, Hispanics and Filipinos, purchased air time on radio stations serving the Black and Hispanic markets, and produced a television public service announcement which was shown as a paid advertisement on television stations serving the Hispanic

84. *In re the Application of Pacific Bell*, No. 87-12-067 (Dec. 22, 1987) (Application 85-01-034; I.85-03-078; 01184; C.86-11-028) [hereinafter *Pac Bell Application*].

85. Marketing Abuse Opening Brief of Public Advocates Minority/Low Income Coalition Application, No. 85-01-034 (Mar. 20, 1987) [hereinafter *Abuse Brief*].

86. *Pac Bell Application*, *supra* note 84, at 68.

87. *Pac Bell Application*, *supra* note 84, at 79 (quoting *Pac Bell Application* 86-08-026 "mimeo," at 19-20).

88. *Pac Bell Application*, *supra* note 84, at 81-82.

market.⁸⁹ Pacific Bell also contacted 736 community organizations with offers of brochures, meetings and speakers, with or without interpreters.

A follow-up study ordered by the PUC⁹⁰ was done by Field Research Corporation⁹¹ to determine whether the campaign in fact made residential customers aware of the availability of lifeline service and whether it made customers with auxiliary services aware of their right to seek refunds of charges paid for those services.

The Field study determined that the notification campaign resulted in moderate levels of awareness in the population as a whole but significantly less awareness among minority and low income populations.⁹² For example, while over half of all customers to whom speed dialing service was sold during the relevant period knew they had the service, only 36% of low income customers knew they were paying for this service. Only 20% of all Hispanic customers who had this extra service knew that they were paying extra for it.⁹³ In the subgroup of Hispanic customers who were interviewed in Spanish, the awareness level was only 9%.⁹⁴ Similar low awareness levels were shown for minority and low income customers who had call forwarding and three-way calling.⁹⁵

The most telling proof of deficiency in the educational campaign to inform low income and minority customers was the figures showing the economic and racial breakdown of customers whom the program had failed to inform about their eligibility for refunds. Of those customers who were not aware they had the optional services and had not received refunds for those services, 48% were low income and 62% were black or Hispanic.⁹⁶

The evidence from both the claimants who sought benefits in

89. Testimony of G.J. Sullivan on Marketing Sales Issues, Pacific Bell (U 10C) Application No. 85-01-034, at 4-6 (Dec. 9, 1986).

90. *Abuse Brief*, *supra* note 85, at 2 (quoting CPUC Opinion of May 28, 1986, and Aug. 6, 1986).

91. *Abuse Brief*, *supra* note 85, at Exhibit 725A, Field Exhibit Research Charts, Appendix A-B.

92. *Abuse Brief*, *supra* note 85, at Exhibit 725A, Field Exhibit Research Charts, at Chart 1.1.

93. *Abuse Brief*, *supra* note 85, at Exhibit 725A, Field Exhibit Research Charts, at Chart 5.8.

94. *Abuse Brief*, *supra* note 85, at Exhibit 725A, Field Exhibit Research Charts, at Chart 5.8.

95. *Abuse Brief*, *supra* note 85, at Exhibit 725A, Field Exhibit Research Charts, at Chart 5.8.

96. *Abuse Brief*, *supra* note 85, at Exhibit 725A, Field Exhibit Research Charts, at Charts 5.2, 5.7, 5.9.

1975 in the *Antibiotics Antitrust* case and the 1987 Field Research Corporation study of California telephone customers strongly suggests that low income, less sophisticated, less educated and nonnative English speaking class members do not share in the benefits of a claims procedure with anything approaching the same frequency as other societal groups. Instead, a claims requirement, by its very nature, has the unintended effect of skewing the benefits actually delivered toward the more affluent, educated, and nonminority population. Moreover, the Field study shows that more advertising and more intensive marketing may not solve the problem of unequal knowledge about rights to claim refunds or similar benefits.⁹⁷

This data has serious implications for a claims procedure since no class member can make a claim unless he or she first becomes aware of the right to do so. Faced with the statistics indicating a lack of benefit to certain segments of the public from the educational campaign in the *Pacific Bell* proceeding, the California Public Utilities Commission posed the question which often will face a court in a consumer class action case involving a large class with small per capita damages. The PUC stated, "There remains, however, the question of what to do about the fact that not everyone has been reached and not everyone can be reached."⁹⁸

The Public Utilities Commission chose a form of cy pres relief to supplement the direct benefits to the injured ratepayers as a means of fairly and responsibly providing benefits to the customers who were not made aware of their rights by the claims procedure. This remedy will be discussed in detail below.

V. USE OF FLUID RECOVERY TO AUGMENT CLAIMS PROCEDURES

The very low claims rates in large consumer class actions and

97. Marketing analysts have studied how various factors influence the redemption rates of cents-off coupons. For the influence of demographic factors, however, "[n]o individual or household consumer data are now available with respect to redemption or nonredemption." Reibstein & Traver, *Factors Affecting Coupon Redemption Rates*, 46 J. MARKETING 102, 105 (Fall 1982). One recent finding from a coupon redemption study offers some support for the argument for mechanisms to supplement claims procedures. As the authors report, "[r]edemption rates are declining as the number of coupons [distributed] continues to increase." Kingsbury, *Study Provides Overview of Who's Redeeming Coupons and Why*, 21 Marketing News, Jan. 2, 1987, at 56, col. 3. The findings suggest that as consumers are inundated with an ever-increasing barrage of printed advertising in the form of coupons, the likelihood increases that an announcement of a right to claim will go unnoticed, or be ignored as just one more coupon-type offer.

98. *Pac Bell Application*, *supra* note 84, at 83.

the evidence of inherent socioeconomic bias in a claims requirement strongly suggests that a claims-based recovery, standing alone, cannot be fair to a large and diverse class. Instead, claims procedures should be augmented by another mechanism to ensure that indirect benefits will flow to those class members who do not make a claim for direct benefits. In designing these mechanisms, courts have turned to the equitable doctrine of cy pres.

A. *Origin of the Cy Pres Remedy*

The doctrine of cy pres originated in the law of charitable trusts. In that context, it provides that when the literal terms of a trust become impossible to follow, the funds should be put to "the next best use," in accord with the purposes of the trust.⁹⁹ In class action litigation, the use of cy pres remedies is often referred to as "fluid recovery." Fluid recovery is generally used to distribute the residue of a fund created by settlement or judgment when the claims rate is less than 100%.¹⁰⁰

Fluid recovery in consumer class actions is especially suited to addressing certain of the goals of such cases. The first is ensuring that defendants completely disgorge any illegally obtained profits.¹⁰¹ As described by the California Court of Appeal for the Fourth District in *Bruno v. Superior Court*, fluid recovery is necessary where proof of claims is impractical, because without fluid or cy pres recovery the action would neither compensate nor deter. Relying solely on a claims procedure where the claims rate is low would allow the defendant to "benefit from the cumbersome nature of legal proceedings and the lack of sophistication and indolence of the consumer, and will reward his foresight in stealing from the multitude in small amounts."¹⁰²

This sentiment was echoed by the California Supreme Court

99. G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 431-42 (rev. 2d ed. 1977). See also *In re Estate of Gatlin*, 16 Cal. App. 3d 644, 648, 94 Cal. Rptr. 295, 296-97 (1971).

100. 1 H. NEWBERG, *supra* note 1, § 11.20. For an excellent discussion of cy pres remedies and a detailed discussion of cases in which they have been used, see Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L.J. 729 (1987).

101. Note, *Equitable Trusts*, *supra* note 1, at 1597; see *Levi Strauss*, 41 Cal. 3d at 475-76, 715 P.2d at 573, 224 Cal. Rptr. at 614 (describing fluid recovery as the payment of the total damage liability to a class fund, followed by payment of individual claims from the fund, the use of the residue to benefit absent class members).

102. *Bruno v. Superior Court*, 127 Cal. App. 3d 120, 127, 179 Cal. Rptr. 342, 345-46 (1981) (quoting Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 846 (1974)).

when it stated that the use of fluid recovery is imperative to ensure that guilty defendants do not keep their ill-gotten gains simply because "their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts."¹⁰³ As Newberg puts it, policy considerations "dictate a preference for an appropriate cy pres distribution rather than a reversion of undistributed funds to the defendant, the alleged wrongdoer."¹⁰⁴ In the settlement context, cy pres is equally important because it can be used to ensure that the class will in fact receive benefits, whether direct or indirect, of some minimum amount even if the claims rate falls short of that projected by the parties at the time of the settlement.¹⁰⁵

A cy pres distribution mechanism is usually used to provide benefits to nonclaiming class members after individual claims distribution has taken place. The implementation of fluid recovery or cy pres distribution usually involves three steps.¹⁰⁶ First, the entire corpus of the settlement is placed into escrow for distribution to the class. After the total amount of the judgment or settlement is paid into a fund, class members are notified and given the opportunity to claim their individual benefits. Lastly, the residual funds are distributed by whichever method the court or the parties have selected.¹⁰⁷

B. *Methods of Cy Pres Fluid Recovery*

Methods of fluid recovery include price rollbacks, escheat, pro rata fund sharing, and trust funds.¹⁰⁸ The first three methods are

103. *Levi Strauss*, 41 Cal. 3d at 472, 715 P.2d at 571, 224 Cal. Rptr. 612.

104. 1 H. NEWBERG, *supra* note 1, § 11.20, at 416-17. *See also* Six (6) Mexican Workers v. Arizona Citrus Growers, 641 F. Supp. 259, 265 (D. Ariz. 1986). As the court stated in *Six Mexican Workers*, "In contrast to having the undistributed damages revert back to defendants, which would in effect reward the defendants for their inadequate record-keeping, fluid recovery distribution would serve to compel observance of the statute." *Id.* at 269.

105. For cases where cy pres has been used in settlements, see *Ohio Pub. Interest Campaign v. Fisher Foods, Inc.*, 546 F. Supp. 1, 5 (N.D. Ohio 1982); *In re Three Mile Island Litigation*, 557 F. Supp. 96, 96-97 (M.D. Pa. 1982) (settlement calling for one-fifth of total payment to be used for a public health fund). The following cases are described in 1 H. NEWBERG, *supra* note 1, § 11.20, at nn.57-459: *Girsh v. Jepson*, 64 F.R.D. 86 (E.D. Pa. 1981) (residue of securities settlement award to three law libraries); *Sanchez v. Lowell Leberman*, 79 F.R.D. 21 (W.D. Tex. 1979) (residue paid to medical center); *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 382 F. Supp. 999 (E.D. Pa. 1974) (residue of antitrust settlement awarded to establish law school scholarships).

106. *See generally* Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 47 N.Y.U. L. REV. 477, 482 (1972).

107. *See Levi Strauss*, 41 Cal. 3d at 472-73, 715 P.2d at 571, 224 Cal. Rptr. at 605. For cases using this procedure, see *Girsh*, 64 F.R.D. at 86; *Sanchez*, 79 F.R.D. at 21; *Lindy Bros.*, 322 F. Supp. at 999.

108. *See* 1 H. NEWBERG, *supra* note 1, § 10.17, § 10.18, § 10.19.

generally less appropriate for large consumer class actions than the trust fund.

1. *Price Rollbacks*

The price rollback approach requires the offending company to lower its prices for a given time until the undeserved profits are "regained" by consumers.¹⁰⁹ Price rollbacks can be an appropriate remedy in conjunction with a claims procedure when the overcharge being addressed is for a product or service repeatedly purchased by a relatively small number of customers and where the defendant operates without competition.¹¹⁰ Price rollbacks are problematic in large consumer class actions because in nonmonopoly markets they compel the consumer to obtain his "refund" by making further purchases of the defendant's products to the benefit of the defendant and the detriment of the defendant's competitors.¹¹¹ Also, if the defendant is a wholesaler or otherwise does not directly control retail prices, the court overseeing a price rollback will be faced with the gargantuan task of monitoring thousands of retail prices to ensure that the savings are not swallowed by the retailers.¹¹²

2. *Escheat*

Escheat is a concept borrowed from property law. In property law, escheat allows for the reversion of property to the state where there is no individual competent to claim or inherit it.¹¹³ In the class action context, funds unclaimed after a claims procedure may be distributed to the state through "earmarked escheat," where the funds are designated to further the purposes of the underlying cause of action, or through "general escheat," where the recovery goes into the state general fund.¹¹⁴ Earmarked escheat requires the coopera-

109. See generally *Levi Strauss*, 41 Cal. 3d at 472, 715 P.2d at 571, 224 Cal. Rptr. at 612; 1 H. NEWBERG, *supra* note 1, § 11.18, at 380; Note, *Consumer Trust Fund*, *supra* note 100, at 754-55. See *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967) (reduction of cab fares); *Colson*, 59 F.R.D. at 324 (reduction of room rates to offset illegal charges on incoming phone calls); see also cases cited in Note, *Consumer Trust Fund*, *supra* note 100, at 753-55.

110. *Levi Strauss*, 41 Cal. 3d at 473, 715 P.2d at 571, 224 Cal. Rptr. at 612; Note, *Equitable Trusts*, *supra* note 1, at 1593.

111. See 1 H. NEWBERG, *supra* note 1, § 10.18, at 380; *Levi Strauss*, 41 Cal. 3d at 473-74, 715 P.2d at 572, 224 Cal. Rptr. at 613.

112. Note, *Consumer Trust Fund*, *supra* note 100, at 755.

113. BLACK'S LAW DICTIONARY 448 (5th ed. 1979).

114. *Levi Strauss*, 41 Cal. 3d at 474, 715 P.2d at 572, 224 Cal. Rptr. at 613; see generally 1 H. NEWBERG, *supra* note 1, § 10.19, at 380-82.

tion of the involved government agency and thus should not be used when the government is in any way antagonistic to the purposes of the case.¹¹⁵ Furthermore, the award of earmarked escheat to the state may cause the Legislature to reduce its outlays for the benefited programs to match the amount of the award, thus effectively turning earmarked funds into general funds and ignoring the underlying purpose of the class action.¹¹⁶ This will produce no direct benefit for the class, only a miniscule overall increase in government funds.

General escheat is easy to administer, but it is the least focused method of distribution in that it spreads the benefits among all taxpayers and there is no attempt to ensure that the underlying purposes of the litigation are served. For this reason, the California Supreme Court has said that general escheat is a "last resort" that should be used only when a more directed form of fluid recovery cannot be fashioned.¹¹⁷

3. *Claimant Fund Sharing*

In claimant fund sharing, the court allows the award to be divided pro rata among all those who successfully apply.¹¹⁸ Like other cy pres means that specify a total dollar amount to be paid by the defendant, claimant fund sharing is an effective mechanism for ensuring disgorgement and deterrence. However, it may exacerbate the inequities inherent in a claims procedure as it increases the recovery of those who claim but provides nothing for those class members who do not file a claim.¹¹⁹

The evidence that certain groups are likely to be under-represented as claimants makes it particularly inappropriate to give their benefits to other claimants without first exploring indirect means of delivering benefits to nonclaimant class members.

115. *Levi Strauss*, 41 Cal. 3d at 474, 715 P.2d at 572, 224 Cal. Rptr. at 613.

116. See Note, *Consumer Trust Fund*, *supra* note 100, at 752.

117. *Levi Strauss*, 41 Cal. 3d at 475, 715 P.2d at 572-73, 224 Cal. Rptr. at 613. As Newberg puts it, escheat serves the deterrence goal, but not the compensation goal of class actions. 1 H. NEWBERG, *supra* note 1, § 10.19, at 381. In California, the Civil Code expressly confirms that the ordinary rules of escheat are not intended to deprive the courts of the power to order other cy pres uses. CAL. CIV. PROC. CODE § 1519.5 (West Supp. 1988) (noted in *People v. Parkmerced Co.*, 88 D.A.R. 1907 (1988)).

118. *Levi Strauss*, 41 Cal. 3d at 475-76, 715 P.2d at 573, 224 Cal. Rptr. at 614; Note, *Consumer Trust Fund*, *supra* note 100, at 755-59; Note, *Equitable Trusts*, *supra* note 1, at 1600.

119. *Levi Strauss*, 41 Cal. 3d at 476, 715 P.2d at 573, 224 Cal. Rptr. at 614; Note, *Consumer Trust Fund*, *supra* note 100, at 755, 757-58. Fund-sharing may also create a conflict of interest for the named plaintiff since his or her share will increase if the level of participation by the class is low. *Id.* at 757.

4. *Consumer Trust Funds*

The method of cy. pres or fluid recovery most appropriate in consumer class actions is the consumer trust fund. A consumer trust fund remedy operates either by endowing a new project or by funding an existing private program. A consumer trust fund "achieves the cy pres purpose most closely"¹²⁰ for several reasons. It can be structured to serve the purposes of the underlying litigation, thus avoiding the uncertainties of earmarked escheat or general escheat; it avoids the market disruption of price rollbacks; and most importantly, consumer trust funds can be structured to serve all the members of the class, regardless of their sophistication or socioeconomic status. The benefit takes the form of increased services to, or protection of rights of the entire class, which is preferable to limiting benefits only to those who successfully complete a claim.

Many decisions have upheld settlements that funded consumer trust funds as part of a larger settlement, usually after a claims procedure. In *In re Three Mile Island Litigation*,¹²¹ the court approved the creation and funding of a foundation to study the biological effects of radiation exposure from future nuclear power accidents.¹²² Another settlement approved the use of a residual from an antitrust class action to fund loans for needy students at two law schools.¹²³ In *Six Mexican Workers v. Arizona Citrus Growers*,¹²⁴ the court endorsed the concept of fluid recovery for funds which could not be claimed by migratory farmworkers.¹²⁵ Plaintiffs asked that the funds be placed in trust for economic development in those areas of Mexico in which the plaintiff farmworkers reside.¹²⁶ The court held that it had broad equitable discretion to award this or any other cy pres recovery, and ordered the plaintiffs to submit a detailed proposal for further consideration.

In the Department of Energy cases, collectively known as the Petroleum Violation Escrow Account Cases (PVEA),¹²⁷ a consumer

120. Note, *Consumer Trust Fund*, *supra* note 100, at 765.

121. 557 F. Supp. 96 (M.D. 1982).

122. *Id.*

123. *Lindy Bros.*, 382 F. Supp. at 1077.

124. 641 F. Supp. 259, 265 (D. Ariz. 1986).

125. *Id.* at 265.

126. *Six Mexican Workers*, 641 F. Supp. at 265.

127. *United States v. Exxon Corp.*, 561 F. Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (T.E.C.A. 1985), *cert. denied*, 474 U.S. 1105 (1986), *reh'g denied*, 474 U.S. 1112 (1988). For a discussion of the theoretical bases for the trust fund concept in the PVEA cases, see Note, *Collecting Overcharges from the Oil Companies: The Department of Energy's Restitutionary Obligation*, 32 STAN. L. REV. 1039 (1980).

trust fund remedy was adopted for that portion of the overcharges allocated by decision or settlement to consumers rather than to commercial users of overpriced oil. In one of the PVEA cases, for example, the U.S. District Court for the District of Columbia determined that the best way to give restitution to injured consumers of oil which had been overpriced during the price controls of the late 1970's was to use the overcharge monies for one or more of five energy conservation programs.¹²⁸

The California Public Utilities Commission utilized a cy pres consumer trust fund remedy to benefit customers who were not reached through a program of education of the right to claim a refund. When the follow-up study in the *Pacific Bell Marketing Issues*¹²⁹ administrative proceeding showed that significant subgroups were not effectively educated about the right to a refund, the Public Utilities Commission imposed upon Pacific Bell a "limited purpose penalty" of \$16.5 million for the purpose of providing restitution to these injured ratepayers. The penalty was designed for the "establishment of a trust to further ratepayer educational efforts."¹³⁰

C. Structuring Consumer Trust Funds

The structure of the consumer trust fund can vary widely depending on the goals of the original litigation, the amount of money available, and the time period over which the funds will be used. The court has broad discretion to order uses of the fund which will both deter future violations and also compensate or serve the same group of people who were victims of the practice that formed the basis for the original suit.

1. Statement of Purpose Combined with Oversight by an Independent Board

A general statement of purpose or issues can be combined with delegation of ongoing supervision to an appointed board to provide both guidance and the necessary flexibility to ensure maximum benefit to the injured consumers.

In the *Pacific Bell Marketing Issues* proceeding, for example, the California Public Utilities Commission stated the purposes for

128. See *supra* note 28. For additional cases using the consumer trust fund and a detailed discussion of the merits of the trust fund format in particular types of cases, see Note, *Consumer Trust Fund*, *supra* note 100, at 759-65.

129. See *Pac Bell Application*, *supra* note 84, at 85-86.

130. See *Pac Bell Application*, *supra* note 84.

the funds, but left open to future determination the particular types of activities that would be funded to best achieve those purposes. It stated that the funds "should be used broadly to promote ratepayer education and understanding of the telecommunications system, and to educate ratepayers about their service options in the increasing competitive telecommunications environment."¹³¹ It identified a wide variety of possible educational efforts, including mass media programs, educational forums, community outreach efforts, and grants to selected groups, but it did not say which should be used.¹³²

Similarly, in *Stern v. U.S. Sprint*,¹³³ a telephone overcharge case, the Superior Court of Los Angeles approved a plan of settlement calling for the creation of a \$1,000,000 fund to finance a California nonprofit public benefit corporation. The purpose of the corporation would be to "further the interests of consumer protection through a wide range of activities which may include the dissemination of consumer information, establishment of a consumer complaint center or clearinghouse, establishment of fellowships for work on consumer protection issues in academic or other settings, and participation in administrative hearings or litigation."¹³⁴

In *Vasquez v. Avco Financial Services*,¹³⁵ the residual funds in a case brought under the California Unruh Retail Credit Act¹³⁶ and other consumer protection statutes were designated to be used by Consumers Union¹³⁷ "for a purpose that is reasonably designed to benefit those persons who would otherwise have received the refund."¹³⁸ That fund is used to support the California Credit and Finance Project, which engages in education, research, administra-

131. See *Pac Bell Application*, *supra* note 84, at 86.

132. See *Pac Bell Application*, *supra* note 84.

133. See *Stern v. U.S. Sprint*, No. 000933 (L.A. Super. Ct. filed Apr. 4, 1988).

134. *Id.* Stipulation and Plan of Settlement ¶ 8(D)(3), at 12-13. Court approval of that settlement is now on appeal in the California Second Appellate District.

135. Application for Approval of Amended Memorandum of Understanding, *Vasquez v. Avco Financial Svcs.*, No. NCC119338 (L.A. Super. Ct. filed May 9, 1984) [hereinafter *Vasquez Memorandum*].

136. CAL. CIV. CODE §§ 1801-1812.20 (West 1985).

137. Consumers Union was selected as the recipient of these funds in part because of its reputation for vigorous consumer advocacy. *Vasquez Memorandum*, *supra* note 135, at 4. Consumers Union is a nonprofit membership organization chartered in 1936 to provide information, education, and counsel about consumer goods, services, and the management of family income. 53 *Consumer Rep.* 539, 594 (Sept. 1988). Consumers Union publishes *Consumer Reports*, a monthly magazine, which carries articles rating products that Consumers Union has tested, as well as articles on consumer services and issues which affect consumer welfare (For example, see *Who Can Afford a Nursing Home*, 53 *CONSUMER REP.* 300 (May 1988); *Garbage Bags: Which Ones are Truly Hefty?*, 53 *CONSUMER REP.* 339 (May 1988)).

138. *Vasquez Memorandum*, *supra* note 135, at 4.

tive and legislative advocacy, and litigation.¹³⁹ After the effectiveness of the Consumers Union cy pres project was demonstrated, other courts approved agreements awarding residual funds to Consumers Union for consumer advocacy and education.¹⁴⁰

This form of cy pres trust fund remedy has been described as the "existing organization" model because under it the court or the parties select an existing consumer organization with a proven track record to use the funds for the benefit of persons affected by the practices which were the subject of the initial suit.¹⁴¹ It was recently endorsed by the California Court of Appeal in *People v. Parkmerced Co.*¹⁴² In that case, the trial court awarded wrongfully withheld security deposits whose owners could not be located to the tenants' organization for use in representing the interests of the current tenants.¹⁴³

In both *Avco* and the *Pacific Bell Marketing Issues* matter, the trust fund contained a broad definition of purpose and a delegation of day-to-day decisions on activities to be funded either to a grantmaking board or to an existing consumer organization. The use of a statement of purpose and the involvement of existing organizations, advisory or grantmaking boards, and class counsel can minimize the need for ongoing supervision by the court.¹⁴⁴ The court should, of course, retain jurisdiction in the event that changed circumstances require a modification of the original order.¹⁴⁵

139. The California Credit and Finance Project is advised by a fifteen-member board that includes academicians, government lawyers, attorneys who specialize as class counsel, and a consumer complaint specialist.

140. Proposed Order Re: Approval of Class Settlement and Final Judgment of Dismissal at 3, *Sturdevant v. Hibernia Bank, First National Bank of Chicago*, No. 814105 (S.F. Super. Ct. filed Oct. 10, 1986) [hereinafter *Hibernia Settlement*].

141. Note, *Consumer Trust Fund*, *supra* note 100, at 760-61.

142. 198 Cal. App. 3d 683, 244 Cal. Rptr. 22 (1988).

143. *Id.* at 693, 244 Cal. Rptr. at 27.

144. In response to arguments that fluid recovery unnecessarily complicates the simple mechanics of a claims procedure, the court's defense of fluid recovery in *Antibiotics Antitrust* case is relevant: "[n]either the asserted complexity of the issues nor the magnitude of the claimants and the asserted damages can be allowed to preclude the fair administration of justice. A judicial system which places a higher premium on convenient administration than on redress of grievances soon ceases to be just." *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 659, 669 (D. Minn. 1974). The *Antibiotics Antitrust* court further stated that, "the Court fully intends that the money being paid for the consumers in this action will go to them. . . . Hard work and imagination will be required but these two requirements are not new to any of the parties or to the Court in this litigation. . . ." *Id.*

145. For example, suppose that a court awarded a residual fund to a consumer organization to advocate for consumers in connection with credit life insurance. Suppose further that the consumer organization was successful in securing legislation or administrative regulations adequately addressing the problems faced by consumers in the pricing and sale of that product.

2. *Determining the Amount of the Trust Fund*

In the *Pac Bell Marketing Issues* matter, the PUC's continuing jurisdiction allowed it to set the dollar amount of the trust fund after completion of the customer notification program and extensive follow-up studies into the effectiveness of that program. Counsel negotiating a particular class settlement, however, and a court attempting to craft a class judgment do not have the benefit of knowing the future claims rate or demographics of claimants.

Although neither the court nor the parties can predict future claims rates with certainty, they can use the cy pres consumer trust fund mechanism to ensure benefit to the class members in the event of a low claims rate. This can be accomplished by setting a predetermined dollar amount that will be paid directly to claimants if possible and "poured over" into cy pres uses if it is not exhausted by claims. Such a pour-over provision: (1) maximizes the benefit delivered directly to class members, and (2) ensures a floor on the total value of benefits to the class if the claims rate is lower than originally anticipated.

In *Ohio Public Interest Campaign v. Fisher Foods*,¹⁴⁶ for example, the value of unclaimed coupons was poured over into a consumer trust fund. The principal remedy was \$20 worth of coupons redeemable for groceries, distributed by mailing to every household in the geographic area, unless that household had opted out. The settlement also called for payments to a trust fund for the purchase of food for the needy. The amount to be paid into the trust fund increased as the coupon redemption rate fell.¹⁴⁷

Another case in which the amount of the cy pres trust fund monies varied inversely with the direct claims paid was *West Virginia v. Chas. Pfizer & Co.*¹⁴⁸ In that case, the class notice informed eligible individuals that the failure to file a claim would be deemed to authorize the various states, through their attorneys general, to recover on their behalf.¹⁴⁹ The unreported stipulated judgment in *Sturdevant v. Hibernia Bank*¹⁵⁰ used a combination of claimant

The consumer organization or the class counsel might then apply to the court for use of the remaining funds on related issues affecting the same original class members. On the other hand, a more flexible initial statement of purposes could have avoided the need to apply for such a modification.

146. 546 F. Supp. 1, 5 (N.D. Ohio 1982).

147. *Ohio Public Interest*, 546 F. Supp. at 5.

148. 440 F.2d at 1079.

149. *Id.* at 1091.

150. *See Hibernia Settlement*, *supra* note 140.

fund sharing and a pour-over of residual funds for cy pres use. The court created a \$200,000 settlement fund and called for claims by class members. It specified that each claimant would receive between 45% and 100% of the total challenged fees paid to Hibernia Bank. If the claims did not exhaust the fund, each claimant would receive a 100% refund of all the challenged fees.¹⁵¹ The settlement further provided that "any portion of the settlement fund which remains undistributed shall be paid as a cy pres remedy to Consumers Union for the purposes of research, advocacy, and education concerning banking practices for the general benefit of California bank customers."¹⁵² Those claiming refunds exhausted only nine percent of the settlement fund. The cy pres provision for the residue ensured that the remaining amount of the settlement would inure to the benefit of the class.

Some courts have approved settlements calling for a discrete amount of money to be paid for cy pres trust fund use which does not vary with the claims rate. For example, in *Rudolfi v. Bank of America*,¹⁵³ the court approved a settlement agreement calling for a claims procedure for credits and coupons, as well as payments to a consumer trust fund totalling \$2.5 million over ten years. In *Rebney v. Wells Fargo Bank*,¹⁵⁴ the court-approved settlement agreement included a provision for the payment of \$750,000 for a public television series on consumer financial issues and \$250,000 for consumer research and education on personal financial issues.

A cy pres fund in which the amount going into the fund varies inversely with the claims rate offers an important advantage over a fund in which the amount is separately set and unchangeable. When the fund is created from a residue remaining after claims are made, the fund acts as an insurance policy for the class to assure that benefits are delivered, even if the claims rate is unexpectedly low. Moreover, the assurance that the funds will be paid to cy pres uses if there are insufficient claimants provides the defendant with an incentive to maximize class member knowledge of the right to make a claim. The defendant has every incentive to encourage claims by its present or former customers so that the funds go back to them rather than being poured over into cy pres use. If, on the other hand, the total amount of the judgment or settlement fund is set in advance, the defendant has no incentive to make certain that class members learn

151. See *Hibernia Settlement*, *supra* note 140, at 2-3.

152. See *Hibernia Settlement*, *supra* note 140, at ¶ 6.

153. No. 720308 (S.F. Super. Ct. filed Dec. 16, 1987).

154. No. 720307 (S.F. Super. Ct. filed Apr. 4, 1988).

of their right to make a claim.

3. *Interest Earned on Cy Pres Consumer Trust Funds*

An important aspect of the management of consumer trust funds is ensuring that monies awaiting distribution earn interest for the class. The interest on funds placed into escrow or held by plaintiff's counsel or an independent third party on behalf of the class can be significant. In one antibiotics antitrust class action, the interest totalled at least \$8.7 million.¹⁵⁵

4. *Financial Accountability and Reporting Requirements*

Financial accountability and reporting requirements are essential to any settlement or order setting up a consumer trust fund. In the *Pacific Bell Marketing Issues* matter, the California Public Utilities Commission ordered procedures to facilitate setting up the trust fund and the payment of monies therefrom. First, it ordered that funds be placed in an interest bearing account, so that the interest would accrue for uses benefitting the injured ratepayers.¹⁵⁶ Second, it created a trust disbursements committee and set a goal for the committee of disbursing \$3 million per year for activities to benefit ratepayers over each of the next five years.¹⁵⁷ The Commission required that the financial trustee file annual accountings with the PUC executive director showing the amounts disbursed, the identity of those receiving disbursements, and the account or trust balances as of the same period.¹⁵⁸ It further expressly ordered that the administrative defendant should not benefit from the trust or further its marketing goals or any other corporate profit motive by virtue of the trust.¹⁵⁹

In *Vasquez v. Avco Financial Services*,¹⁶⁰ in which funds were awarded to Consumers Union for use in consumer advocacy and education, the Memorandum of Understanding required annual au-

155. *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 481 F.2d 1045 (2d Cir. 1973) (discussed in 1 H. NEWBERG, *supra* note 1 § 12.05, at 527 n.30, § 12.25, at 565).

For other settlement agreements requiring the payment of interest, see 1 H. NEWBERG, *supra* note 1, § 12.05, at 528 n.37 (citing *Kohn v. American Metal Climax, Inc.*, CA No. 70-933 (E.D. Pa. 1973) (unreported class settlement notice, N.Y. Times, June 7, 1973)), and 527 n.31 (citing *Gould v. American Hawaiian Steamship Co.*, CA Nos. 3707, 3722 (D. Del. 1973) (unreported partial class settlement notice, Wall St. J., Apr. 9, 1973, N.Y. Times, Apr. 12, 1973)); see also *Hartford Hosp.*, 52 F.R.D. at 135.

156. *Pac Bell Application*, *supra* note 84, at 87.

157. *Pac Bell Application*, *supra* note 84, at 86, 328.

158. *Pac Bell Application*, *supra* note 84, at 86, 328.

159. *Pac Bell Application*, *supra* note 84, at 86-87.

160. *Vasquez Memorandum*, *supra* note 135, at NCC 11933B.

dited financial statements, semiannual reports of activities to an advisory board, and semiannual plans of anticipated work to be submitted to the original class counsel.¹⁶¹

VI. CONCLUSION

The goals of consumer class actions are threefold: disgorgement of unlawful profits, deterrence of future wrongdoing, and compensation of the injured class members. When small amounts are at stake for each member of a large class, special care must be taken to ensure that the distribution mechanism does not "reward [the defendant] his foresight in stealing from the multitude in small amounts."¹⁶²

Whether a class action is resolved by settlement or by judgment, counsel and the courts have an obligation to ensure that the remedy is fair to all those whose interests are compromised, and not only to those with the sophistication to learn about and use a claims procedure. The consumer trust fund remedy can be used to provide indirect relief when vigorous efforts to reach individual class members are unlikely to be effective in reaching, educating, and motivating the class members to claim a relatively small monetary benefit per class member.

There is substantial evidence of very low claims rates in recent large consumer class cases. Further, demographic studies show that claims procedures do not evenly benefit class members across socioeconomic lines. Because of these factors, counsel should be hesitant to propose, and the courts even more hesitant to approve, claims procedures in class action settlements without back-up mechanisms such as the consumer trust fund to ensure adequate benefits to all class members.

161. *Vasquez Memorandum*, *supra* note 135, at NCC 11933B.

162. *Bruno*, 127 Cal. App. 3d at 127, 179 Cal. Rptr. at 345-46.

